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91-742

Supreme Court, U.S.
FILED
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**IN THE SUPREME COURT
OF THE UNITED STATES**

PORTER E. KRISHER,
Petitioner

vs.

RONALD SHARPE, ROBERT G. WERTS, BROOK YOUNG and RICHARD MOONEY,
Respondents

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

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QUESTION PRESENTED FOR REVIEW

I. WHETHER OR NOT THE COURT OF APPEALS FOR THE THIRD CIRCUIT ERRED AS A MATTER OF LAW IN AFFIRMING THE DISTRICT COURT'S DISMISSAL OF PETITIONER'S COMPLAINT WHERE PETITIONER DEMONSTRATED THAT PETITIONER IS ENTITLED TO A PERMANENT INJUNCTION BARRING ENFORCEMENT OF A REGULATION PROHIBITING POLICE OFFICERS FROM RUNNING FOR POLITICAL OFFICE BECAUSE RESPONDENTS UNILATERALLY ENACTED AND ENFORCED THIS UNCONSTITIONAL OVERBROAD TERM AND CONDITION OF PETITIONER'S EMPLOYMENT WITHOUT ANY AUTHORITY TO DO SO?

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IN THE SUPREME COURT
OF THE UNITED STATES

NO.

PORTER E. KRISHER,
Petitioner

versus

RONALD SHARPE, ROBERT G. WERTS,
BROOK YOUNG and RICHARD MOONEY,
Respondents

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Porter E. Krisher, prays that a writ of certiorari issue to review judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Third Circuit rendered July 31, 1991 is unrecorded and appears at page 33 of the Appendix herein.

The Order of the United States District Court for the Eastern District of Pennsylvania rendered February 21, 1991, is unrecorded and appears at page 37 of the Appendix herein.

The final Order of the Court of Appeals for the Third Circuit dated July 31, 1991 and this Petition for Writ of Certiorari is timely filed within ninety (90) days thereof. The jurisdiction of the Honorable Court rests upon 28 U.S.C. Section 1254(1) and Rule 17 of this Honorable Court.

FEDERAL PROVISIONS INVOLVED

42 U.S.C. Sec. 1983, First Amendment of U.S. Const. at App. page 36, Fourteenth Amendment to U.S.Constitution at Appendix page 36.

STATEMENT OF THE CASE

On August 28, 1990 Petitioner filed a Federal Civil Rights action against Respondents. Petitioner claimed that the Pennsylvania State Police regulation prohibiting state police officers from running for political office violates Petitioner's rights under the First Amendment to the United States Constitution. Petitioner seeks a permanent injunction to enjoin Respondents from enforcing the regulation. After conference, the parties agreed to prepare a Stipulation of Uncontested Facts that would serve in place of a trial on Petitioner's request for a permanent injunction. In an Order dated December 20, 1990, the Honorable Daniel H. Huyett, 3d, Judge, approved the Stipulation of Uncontested Facts which is set forth as the Statement of Facts. Thereafter, the parties submitted briefs on the Petitioner's Request for Permanent Injunction. On

February 2, 1991, the Honorable Daniel H. Huyett, 3d, entered an Order and Opinion entering judgment in favor of all Respondents and against Petitioner and dismissing Petitioner's Complaint. Appellant timely appealed to the United States Court of Appeals for the Third Circuit. The Third Circuit affirmed. Petitioner respectfully seeks review by this Honorable Court.

STATEMENT OF FACTS

The Stipulation of Uncontested Facts agreed upon by the parties and approved by the District Court is as follows:

1. The Petitioner is Porter E. Krisher, an adult individual residing at r.d. 6, Box 663, Allentown, Lehigh County, Pennsylvania.

2. Defendant, Colonel Ronald M. Sharpe, is an adult individual and, at all times herein relevant, was the Commissioner of the Pennsylvania State Police.

3. Defendant, Captain Robert G. Werts, is an adult individual and, at all times herein relevant, was the Commanding Officer of Troop "M", Bethlehem of the Pennsylvania State Police.

4. Defendant, lieutenant Brooke F. Young, is an adult individual and, at all times herein relevant, was a member of the Pennsylvania State Police's Bureau of Professional Responsibility.

5. Defendant, Captain Richard C. Mooney, is an adult individual and, at all times herein relevant, was a member of the Pennsylvania State Police's Bureau of Personnel.

6. At all times herein relevant, each and every defendant was employed by the Pennsylvania State Police ("PSP") and acted within the scope of his employment.

7. This Court has jurisdiction over this matter pursuant to 28 U.S.C. Section 1331 and 1343 because the action is brought pursuant to 42 U.S.C. Section 1983 for an alleged violation of the First Amendment to the United States Constitution.

8. On September 16, 1965, plaintiff became an enlisted member of the PSP.

9. Upon graduating from the PSP Academy, plaintiff was assigned to Troop "M" Bethlehem, and stationed at the Fogelsville Barracks. Petitioner has been stationed at the Fogelsville Barracks for more than twenty-five years. He currently holds the rank of trooper.

10. As a member of the PSP, Petitioner is subject to the PSP's internal rules and regulations governing members' conduct.

11. Field Regulation 1-1, Section 1.12, Politics, limits the political activities of PSP members as follows:

> A member shall avoid all political or religious arguments while on duty. He/She shall not use his/her position for political influence. A member shall not sign or circulate any political petition, or any other type of petition, in his/her capacity as a Pennsylvania State Police Officer unless authorized by the Commissioner. No Member of the Department shall be an officer in a political party or run for or hold a political office during his/her employment. No member shall solicit any assessments, contributions or services for any political party. Nothing contained herein shall affect the right of a Member to hold membership in, and privately support, a political party; or to vote as he/she chooses; or to privately express his/her opinion on any political subject or candidate; or to maintain political neutrality; or to attend political meetings as a private citizen.

Field Regulation 1-1, Section 1.12 has been in effect in this form since January 13, 1975.

12. Despite Field Regulation 1-1, Section 1.12, from February 15, 1989 until

March 1, 1989, Petitioner circulated two petitions to have his name placed on the official ballot as a Republican candidate in the primary election for the office of Upper Macungie Township Board of Supervisors, Lehigh County, Pennsylvania.

13. Petitioner was aware of Field Regulation 1-1, Section 1.12 prior to circulating the petitions. Petitioner was also aware that a former member of the PSP had been dismissed from the PSP for violating Field Regulation 1-1, Section 1.12 and other internal regulations.

14. On March 3, 1989, Petitioner filed the petitions under oath with the Lehigh County Board of Elections. On the petitions, Petitioner listed his occupation as a member of the PSP.

15. Sometime after March 22, 1989, the deadline for withdrawing as a candidate, Petitioner attempted to withdraw from the election, but he was unsuccessful.

16. Meanwhile, posters were printed up on Petitioner's behalf and publicly displayed. Articles appeared in The Morning Call listing Petitioner as a candidate for the township supervisor's office and quoting Petitioner as to his political views.

17. In the primary election held on May 16, 1989, Petitioner's name appeared on the voting machine ballot. Although he lost, Petitioner received 264 votes.

18. On May 22, 1989, the PSP's Bureau of Professional Responsibility ("Bureau") received an anonymous complaint which alleged that Petitioner had run for political office while employed by the PSP.

19. The Bureau assigned Lieutenant Brooke F. Young to investigate the complaint.

20. On July 7, 1989, upon completion of the investigation, Captain Robert G. Werts, Commanding Officer of Troop "M",

issued a Disciplinary Action Report to Petitioner charging him with a violation of Field Regulation 1-1, Section 1.12.

21. Thereafter, the Department Disciplinary Officer determined that the offense with which Petitioner was charged was a court-martialable offense.

22. From December 13, 1989 until April 29, 1990, Petitioner was placed on "restricted duty"-restricted to on-station duties-but he still retained the full powers of a PSP officer and received full pay.

23. A court-martial hearing was held on April 4, 1990.

24. PSP court-martial proceedings are legislatively governed by 71 P.S. Section 251.

25. At the conclusion of the hearing, the three-member court-martial board, by unanimous vote, found that Petitioner ran for a political office during his

employment with the PSP and, as such, was guilty of violating Field Regulation 1-1, Section 1.12. The board, again by unanimous vote, recommended that Petitioner be sanctioned with a ninety-day suspension without pay.

26. Commissioner Sharpe, as the final arbiter of the court-martial proceeding, basically adopted the board's findings of fact, conclusions of law, and recommended sanction.

27. On April 25, 1990, the Commissioner suspended Petitioner from the PSP force without pay, effective April 29, 1990, for a total of ninety working days.

28. Thereafter, on May 11, 1990, the Supreme Court of Pennsylvania in Commonwealth of Pennsylvania v. State Conference of State Police Lodges of the Fraternal Order of Police, Nos. 8 and 9 M.D. Appeal Docket, 1989, upheld an arbitration award which allowed PSP offi-

cers charged with offenses subject to court-martial proceedings between July 1, 1988 and June 30, 1990 to select grievance arbitration as an alternative to a court-martial.

29. All those members of the PSP who had been court-martialed between July 1, 1988 and June 30, 1990 were then notified of the opportunity to agree to abide by the Commissioner's decision already imposed as a result of the court-martial proceedings or to grieve the penalty imposed by the Commissioner before an arbitrator.

30. Petitioner was among those notified about the election of remedies and, on July 26, 1990, he selected the grievance arbitration procedure.

31. On September 1, 1990, Petitioner returned to full duty and full pay status with the PSP.

32. Petitioner's grievance arbitration proceeding has yet to be scheduled.

33. When Petitioner's matter goes to arbitration, even if the arbitrator finds that Petitioner violated Field Regulation 1-1, Section 1.12, the arbitrator cannot impose a penalty greater than the penalty already imposed by the Commissioner.

34. Petitioner, however, intends to run for political office again in the future.

35. Petitioner alleges that Field Regulation 1-1, Section 1.12 violates his First Amendment rights of free speech and association.

36. Petitioner alleges that Field Regulation 1-1, Section 1.12 is overbroad and may not be enforced consistent with the United States Constitution.

37. Petitioner does not challenge that portion of Field Regulation 1-1, Section 1.12 which prohibits members of the PSP from holding political office during employment.

38. Petitioner concedes that PSP officers who hold political office could compromise the PSP's interest in maintaining an appearance of impartiality in its officers' enforcement of the law.

39. As such, Petitioner concedes that the PSP has a legitimate and substantial state interest in prohibiting its members from holding political office during their employment.

40. Petitioner, does, however, challenge that portion of Field Regulation 1-1, Section 1.12 which prohibits members of the PSP from running for political office during their employment.

41. As such, Petitioner contends that the PSP has no legitimate and substantial state interest in prohibiting its members from running for political office during their employment.

42. Petitioner also argues that the PSP has no authority to enforce Field

Regulation 1-1, Section 1.12 because the regulation was effectuated without any legislative authority.

43. The Respondents, however, contend that the PSP does have legitimate and substantial state interests in prohibiting its members from running for political office during their employment for the following reasons:

a. Members of the PSP have a duty to impartially enforce and execute the laws of the Commonwealth of Pennsylvania. Members of the PSP cannot effectively carry out their law enforcement responsibilities and at the same time be a candidate for or hold political office.

The regulation prevents members of the PSP from utilizing their employment as police officers to favor those individuals who might aid them in their campaigns or adversely affect those individuals who oppose their campaigns. Even if the mem-

bers do not actually favor or adversely affect certain individuals, the public may have that perception.

If a member of the PSP is publicly known to be politically aligned with a particular political party, the public will not perceive that member as an impartial law enforcement officer. That member will be perceived to be that political party's "watchdog". Members of the public who do not belong to that political party will be more suspect of that officer's traffic citations, investigations, arrests, charges, etc. They will perceive the officer's actions as discriminatory against them. Members of the public who are served by the candidate-member may perceive that the jurisdiction which the candidate-member will serve will receive an additional level of police services from the PSP if the candidate-member is elected.

b. One of the goals of the PSP

is to administer and enforce the laws of the Commonwealth of Pennsylvania in a neutral, even handed manner. The PSP cannot carry out this goal if its members are publicly aligned with political parties. If members of the PSP are publicly aligned with political parties, the public will perceive the PSP itself as "backing" those persons and those parties as opposed to being a neutral law enforcement agency. Perhaps the most gross example would be if the Commissioner of the PSP ran for Governor of Pennsylvania on the Democratic ticket. Then the public would perceive the entire PSP membership as backing the Commissioner and the Democratic Party.

c. The PSP fears that if its members could run for or hold political office, they would face conflicts of interest between their duties to uphold the laws of the Commonwealth of Pennsylvania and abide by the internal rules and

regulations of the PSP and their allegiances to their parties.

A PSP member who is also a candidate for or holder of a political office may neglect his/her duties as a PSP officer in the interest of the political office. For example, the speed limit on state highways is 55 m.p.h. A PSP member is sworn to enforce that speed limit. As a candidate for or holder of a political office, that same PSP member may support a change in legislation to increase the speed limit to 70 m.p.h. The member's candidacy or office is then at odds with his/her PSP oath to uphold the laws of Pennsylvania.

Likewise, a PSP member who is a candidate or officeholder may advocate a political position directly contrary to PSP regulations. For example, Field Regulation 2-1, Section 1.03 prohibits members of the PSP from becoming involved in matters regarding the formation or funding of local

police departments. In this case, Petitioner was running for the position of township supervisor in a township which does not currently have an organized police department and, as such, relies solely on the PSP for police protection. In an article which appeared in The Morning Call on May 4, 1989 at page 6, Petitioner stated "The township is changing rapidly, and managing the growth--trying to anticipate the needs of the township--I think that takes a lot of consideration."

Petitioner further stated "I wouldn't want people to think that because I'm a police officer I'm going to say, 'Now we should get a police department.' When the residents are ready, I can aid them." Thus if Petitioner had been elected to the township board of supervisors, there was a real likelihood that he would have become involved in a decision whether or not to create a local police department.

d. The regulation promotes integrity in discharging police duties by avoiding situations where members of the PSP could utilize their positions to attempt to influence or to actually influence members of the public to support them in their political campaigns. The PSP fears that, if it allows its members to run for or hold political office, those members will use their positions to coerce members of the public to register in particular political parties, sign their nominating petitions and/or vote for them in elections. Even if there is no actual coercion, influence or intimidation, the PSP fears that will be the public's perception.

e. The PSP seeks to attract qualified persons through guaranteeing job security free from the political arena. If the PSP allowed its members to run for or hold political office, its ranks could

become filled with political officeholders. How one rose within the ranks of the PSP could then become dependent upon their party affiliation. For example, troopers serve an eighteen-month probationary period following their enlistment. At the end of the eighteen-month period, the probationary trooper's co-troopers, supervising corporals, sergeants, station lieutenant and troop commander make recommendations as to whether the PSP should retain the probationary trooper as a permanent member. If the PSP became too ladened with political officeholders, its members might begin to consider political affiliations in deciding matters of retention.

f. Members of the PSP have access to confidential Criminal History Record Information. A member of the PSP who runs for political office could use such confidential information, to the extent that it exists, against an opponent or a member of

the opponent's family during an election.

g. The PSP wants to avoid any perception by members of the public that how they act politically will affect their relationship with the PSP. For example, the PSP does not want members of the public to believe that, if they do not vote for a member-candidate they will be subject to greater law enforcement scrutiny by the PSP. Likewise, the PSP wants to avoid the perception that members of the public who do sign a petition or vote for a member-candidate will receive more favorable treatment from members of the PSP.

Upon these facts, the District Court entered judgment for Respondents and dismissed Petitioner's Complaint. The Third Circuit affirmed. Petitioner respectfully submits this Petitioner for Writ of Certiorari which is now before this Honorable Court for disposition.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

Review by certiorari is appropriate in the case at bar under Rule 17(1)(a) of the Rules of the United States Supreme Court in that a Federal Court of Appeals has rendered a decision in conflict with the decision of another Federal Court of Appeals on the same matter as to call for an exercise of the Honorable Court's power of supervision.

ARGUMENT

I. WHETHER OR NOT THE COURT OF APPEALS FOR THE THIRD CIRCUIT ERRED AS A MATTER OF LAW IN AFFIRMING THE DISTRICT COURT'S DISMISSAL OF PETITIONER'S COMPLAINT WHERE PETITIONER DEMONSTRATED THAT PETITIONER IS ENTITLED TO A PERMANENT INJUNCTION BARRING ENFORCEMENT OF A REGULATION PROHIBITING POLICE OFFICERS FROM RUNNING FOR POLITICAL OFFICE BECAUSE RESPONDENTS UNILATERALLY ENACTED AND ENFORCED THIS UNCONSTITUTIONAL, OVERBROAD TERM AND CONDITION OF PETITIONER'S EMPLOYMENT WITHOUT ANY AUTHORITY TO DO SO?

1. The Court may permanently enjoin Respondents from enforcing unconstitutional provisions of a regulation. No dispute

exists that this Honorable Court has authority to enjoin these Respondents, State actors, from enforcing unconstitutional provisions of the police regulation. See, e.g., 42 U.S.C. Section 1983.

2. The United States and Pennsylvania Constitutions guarantee all persons the right to free speech including the right to seek elective political office. No dispute exists that the right to seek political office is encompassed in our Federal and State Constitutions.

3. Respondents have enforced and continue to enforce prior restraints on Petitioner's First Amendment right to free speech and association. Despite Petitioner's outstanding work and performance record for Respondents since 1965, Respondents courtmartialled Petitioner solely because Petitioner exercised his constitutional right to run for political office. On April 26, 1990, Respondents suspended

Petitioner indefinitely and without pay because Petitioner allegedly ran for political office in violation of Defendant's field regulation. (App. p 35).

4. Respondents' prior restraints on Petitioner's First Amendment right to free speech and association are unconstitutional absent overriding and weighty counterwriting policies. e.g., Broadrick v. Oklahoma, 413 U.S. 601, 93 S.Ct. 2881, 37 L.Ed.2d 830 (1973); Aiello v. City of Wilmington, 623 F.2d 845 (3d Cir, 1980).

Without overriding and weighty policies to prohibit Petitioner from running for political office, Respondents may not constitutionally enforce its field regulation. (App. p. 35). Id. No overriding and weighty policies exist to support Respondents' regulation. The District Court accepted Defendant's incredible contentions that mere running for political office warrants restrictions of Petition-

er's constitutional rights . As set forth hereinafter, the District Court unrealistically struck the wrong balance. The Third Circuit affirmed.

5. The Respondents have no authority to restrict Petitioner's constitutional right to seek political office. Defendant cannot point to a single authority which authorizes Respondents to restrict Petitioner's constitutional rights. None exists.

a. Respondents have acted in excess of their authority by imposing restrictions upon Petitioner's speech where the legislature has not seen fit to impose such restrictions. Even assuming, arguendo, that Respondents concerns and interests in prohibiting police officers from running for political office are substantial, it is up to the State Legislature to enact such a law. It is not police commissioner, who is appointed by the Governor, unilaterally

to enact and enforce limitations upon Petitioner's First Amendment rights.

b. The United States Congress and Pennsylvania State Legislature, not Respondents, have authority to restrict Petitioner's First Amendment rights in limited circumstances. United States Civil Service Commission v. National Ass'n of Letter Carriers (CSC), 413 U.S. 548, 93 S.Ct. 28, 37 L.Ed.2d 796 (1973); Broadrick v. Oklahoma, 413 U.S. 601, 93 S.Ct. 2908 37 L.Ed.2d 830 (1973).

CSC clearly states that it is Congress who has the power to enact statutes narrowly limiting First Amendment rights. Congress has power to prevent government employees from becoming involved in limited political activities.

The CSC court reasoned that the experience of 1936 and 1938 campaigns convinced Congress that these dangers were sufficiently real that substantial barriers

should be passed. The Supreme Court in CSC, reviewed Congressional hearings, testimony and history which follows.

In 1871, the United States Congress authorized the President to prescribe regulations for the creation of a civil service of Federal employees. In 1883, Congress enacted a Civil Service Act and President Arthur enacted Civil Service Rules. In 1908, President Roosevelt modified the Civil Service Rule I, The Hatch Act predecessor. Rule I covered only classified service. The experience of the intervening years convinced a majority of Congress that the rules should be extended to the entire Federal service. 84 Cong. Rec. 4303, 9595, 9604 and 9610. After lengthy heated debate, Congress passed the Hatch Act. Id. at 9594, 9639. Congress continued to modify the Hatch Act. Hearings continue, but no new legislation has resulted. Hearings of 3374 and 3417, 92nd

Cong. 2nd Session.

The Supreme Court repeatedly relied upon the authority, judgment and intent of Congress. Please see above and CSC 413 U.S. at 568. "Although Congress is free to strike a different balance..." 413 U.S. 548, 564.

The Supreme Court must administer law in accordance with the will of Congress. Id. "Perhaps Congress at some time will come to a different view..." Id. The United States Supreme Court reviewed at length the specific authority Congress gave the Civil Service Commission to enact and enforce regulations. Id. at 574. A complete and honest reading of CSC indicates that the United States Supreme Court validating the Hatch Act, relied heavily upon the intent, finding and authority of Congress in enacting the Act. Only Congress and State Legislatures, not Respondents, have authority to restrict Petition-

er's constitutional rights. Hence, Petitioner's Motion for Permanent Injunction ought to have been granted. Petitioner respectfully seeks review by this Honorable Court.

In Broadrick, the U.S. Supreme Court resounded the aforesaid history and reasoning of CSC in upholding a state statute analogous to the Hatch Act. The Broadrick court relied upon the fact the statute was a "legislative enactment", and thus some leeway. McGowan v. Maryland, 366 U.S. 422, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961).

In the case at bar, Respondents' actions were unilateral and unauthorized. No legislative enactment is involved. Hence, Petitioner's Motion For Permanent Injunction ought to be granted.

c. The Honorable Court of Appeals for the Third Circuit explicitly stated that it is legislative bodies which have authority to inhibit constitutional

rights. In Alderman v. Philadelphia Housing Authority, 496 F.2d 164 (3d Cir, 1974), the Third Circuit stated:

> "We think, however, that Broadrick and Letter Carriers, properly viewed, carve out carefully circumscribed exceptions to the sweeping injunction of the First Amendment, exceptions allowing a legislature-Congress or State lawmakers- to inhibit..."

As stated by the Third Circuit, it is legislatures, not Respondents, who are allowed to limit First Amendment rights. See, also, Rosenthal v. Rizzo, 555 F.2d 390 (3d Cir, 1977). Respondents have no authority to prohibit Petitioner from running for political office. Hence, Petitioner's Motion for Permanent Injunction ought to have been granted.

6. Respondents unilaterally imposed unreasonable overbroad prior restraints upon Petitioner's First Amendment rights. Even assuming, arguendo, that Respondents may impose restrictions upon Petitioner without legislative authority, Defendant's

restrictions are overbroad. Respondents could protect any of their legitimate interests without prohibiting Petitioner from running for political office. Respondents have no overriding and weighty interests which could legitimately prohibit Petitioner from running for office. See, Rosenthal v. Rizzo, supra. In evaluating Petitioner's request for a permanent injunction, the District Court struck the wrong balance. Although a police officer holding office may realistically create concerns Defendant contends, (i.e., appearance of impropriety), mere running for office does not realistically warrant any concern. No reasonable person would believe that just because a person is a candidate for political office that he/she holds some power different from the general public. Respondents expressed concerns are unwarranted and unrealistic. The District Court erroneously held and the

Third Circuit agreed that these concerns warrant substantial limitations of Petitioner's First Amendment rights. Hence, Petitioner's Motion for Permanent Injunction ought to have been granted.

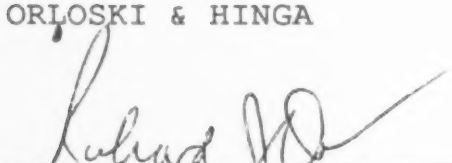
7. Respondents unilaterally have imposed terms and conditions of Petitioner's employment without regard to the collective bargaining agreement. A collective bargaining agreement governs the terms and conditions of Petitioner's employment with the Pennsylvania State Police. Respondents have wholly disregarded that agreement and unilaterally imposed a condition of employment, i.e., Petitioner may not run for political office. Under the agreement, Respondents may not unilaterally impose a condition of employment. The condition is unconstitutional and unauthorized, as aforesaid. The District Court ignored this argument. The Third Circuit affirmed without opinion. Hence, Petition-

er's Motion for Permanent Injunction ought to have been granted.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari ought to be granted.

ORLOSKI & HINGA



Richard J. Orloski
Attorney for Petitioner

UNITED STATES COURT OF APPEALS
THIRD CIRCUIT

NO. 91-1198

PORTER E. KRISHER,
Appellant

versus

RONALD SHARPE, ROBERT G. WERTS,
BROOK YOUNG, RICHARD MOONEY,

Appeal from the United States District Court For the Eastern District of Pennsylvania D.C. Civil Action no. 90-05594
(Honorable Daniel H. Huyett, 3rd)

Submitted July 31, 1991

Before: BECKER, SCIRICA AND ROTH,
Circuit Judges

JUDGMENT ORDER

After consideration of all contentions raised by Appellant, it is ADJUDGED AND ORDERED that the judgment of the district court be and is hereby AFFIRMED. Costs taxed against appellant.

BY THE COURT,

Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PORTER E. KRISHER, Plaintiff	:	CIVIL ACTION
	:	NO. 90-5594
vs.	:	
RONALD SHARPE, ROBERT G. WERTS, BROOK YOUNG and RICHARD MOONEY, Defendants	:	

STIPULATION

The Plaintiff and Defendant, by their respective counsel hereby agree and stipulate that the Stipulation of Uncontested Facts in Lieu of Hearing which was filed with the Court on December 24, 1990 shall be considered the complete and full evidentiary hearing on this matter for all purposes, attorney fees excepted, and no jury trial is required by either party.

Richard J. Orloski
Attorney for Plaintiff

Denise A. Kuhn
Attorney for Defendants

APPROVED BY THE COURT:

DANIEL H.L HUYETT, 3D,
entered: 3/13/91

FIELD REGULATION 1.12 POLITICS .

A Member shall avoid all political or religious arguments while on duty. He/She shall not use his/her position for political influence. A Member shall not sign or circulate any political petition, or any other type of petition, in his/her capacity as a Pennsylvania State Police Officer unless authorized by the Commissioner. No Member of the Department shall be an officer in a political party or run for or hold a political office during his/her employment. No Member shall solicit any assessments, contributions or services for any political party. Nothing contained herein shall affect the right of a Member to hold membership in, and privately support, a political party; or to vote as he/she chooses; or to privately express his/her opinion on any political subject or candidate; or to maintain political neutrality; or to attend political meetings as a private citizen.

FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press, or the right of the people peaceably to assemble and to petition the government for a redress of grievance.

FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PORTER E. KRISHER, Plaintiff	:	CIVIL ACTION
	:	NO. 90-5594
vs.	:	
RONALD SHARPE, ROBERT G. WERTS, BROOK YOUNG and RICHARD MOONEY, Defendants	:	

FINDINGS OF FACT, DISCUSSION, CONCLUSIONS OF LAW, AND ORDER

HUYETT, J. FEBRUARY 15, 1991

This Civil action raises the issue whether a Pennsylvania State Police regulation prohibiting a State Police Officer from running for political office violates the First Amendment of the United States Constitution. Plaintiff seeks a permanent injunction to enjoin defendants from enforcing Pennsylvania State Police Field Regulation 1-1, Section 1.12. Based upon the findings of fact stipulated to by counsel and conclusions of law, I deny plaintiff's motion for a permanent injunction, and dismiss his complaint.

I

Plaintiff's complaint requests a temporary restraining order, a preliminary injunction and a permanent injunction to prevent defendant's enforcement of Pennsylvania State Police Field Regulation 1-1, Section 1.12 against plaintiff. During a conference held with counsel for the parties on November 29, 1990, counsel agreed that the court need only consider the request for a permanent injunction. To that end, counsel also agreed to meet and prepare a stipulation of uncontested facts that would serve in lieu of a trial on plaintiff's request for a permanent injunction. See Order of November 29, 1990, Krisher v. Sharpe, et al., CA 90-5594. In my Order of December 20, 1990 I approved a stipulation of uncontested facts submitted by counsel and ordered full and complete memoranda of law in support of the parties' positions.

II. FINDINGS OF FACT

As agreed to and submitted jointly by counsel for the parties, the facts relevant to the disposition of this complaint are as follows:

1. The Petitioner is Porter E. Krisher, an adult individual residing at R.D. 6, Box 663, Allentown, Lehigh County, Pennsylvania.

2. Defendant, Colonel Ronald M. Sharpe, is an adult individual and, at all times herein relevant, was the Commissioner of the Pennsylvania State Police.

3. Defendant, Captain Robert G. Werts, is an adult individual and, at all times herein relevant, was the Commanding Officer of Troop "M", Bethlehem of the Pennsylvania State Police.

4. Defendant, lieutenant Brooke F. Young, is an adult individual and, at all times herein relevant, was a member of the

Pennsylvania State Police's Bureau of Professional Responsibility.

5. Defendant, Captain Richard C. Mooney, is an adult individual and, at all times herein relevant, was a member of the Pennsylvania State Police's Bureau of Personnel.

6. At all times herein relevant, each and every defendant was employed by the Pennsylvania State Police ("PSP") and acted within the scope of his employment.

7. This Court has jurisdiction over this matter pursuant to 28 U.S.C. Section 1331 and 1343 because the action is brought pursuant to 42 U.S.C. Section 1983 for an alleged violation of the First Amendment to the United States Constitution.

8. On September 16, 1965, plaintiff became an enlisted member of the PSP.

9. Upon graduating from the PSP Academy, plaintiff was assigned to Troop "M" Bethlehem, and stationed at the Fogels-

ville Barracks. Petitioner has been stationed at the Fogelsville Barracks for more than twenty-five years. He currently holds the rank of trooper.

10. As a member of the PSP, Petitioner is subject to the PSP's internal rules and regulations governing members' conduct.

11. Field Regulation 1-1, Section 1.12, Politics, limits the political activities of PSP members as follows:

> A member shall avoid all political or religious arguments while on duty. He/She shall not use his/her position for political influence. A member shall not sign or circulate any political petition, or any other type of petition, in his/her capacity as a Pennsylvania State Police Officer unless authorized by the Commissioner. No Member of the Department shall be an officer in a political party or run for or hold a political office during his/her employment. No member shall solicit any assessments, contributions or services for any political party. Nothing contained herein shall affect the right of a Member to hold membership in, and privately support, a political party; or to vote as he/she chooses; or to privately express his/her opinion on any political subject or candidate; or to

> maintain political neutrality; or to attend political meetings as a private citizen.

Field Regulation 1-1, Section 1.12 has been in effect in this form since January 13, 1975.

12. Despite Field Regulation 1-1, Section 1.12, from February 15, 1989 until March 1, 1989, Petitioner circulated two petitions to have his name placed on the official ballot as a Republican candidate in the primary election for the office of Upper Macungie Township Board of Supervisors, Lehigh County, Pennsylvania.

13. Petitioner was aware of Field Regulation 1-1, Section 1.12 prior to circulating the petitions. Petitioner was also aware that a former member of the PSP had been dismissed from the PSP for violating Field Regulation 1-1, Section 1.12 and other internal regulations.

14. On March 3, 1989, Petitioner filed the petitions under oath with the

Lehigh County Board of Elections. On the petitions, Petitioner listed his occupation as a member of the PSP.

15. Sometime after March 22, 1989, the deadline for withdrawing as a candidate, Petitioner attempted to withdraw from the election, but he was unsuccessful.

16. Meanwhile, posters were printed up on Petitioner's behalf and publicly displayed. Articles appeared in The Morning Call listing Petitioner as a candidate for the township supervisor's office and quoting Petitioner as to his political views.

17. In the primary election held on May 16, 1989, Petitioner's name appeared on the voting machine ballot. Although he lost, Petitioner received 264 votes.

18. On May 22, 1989, the PSP's Bureau of Professional Responsibility ("Bureau") received an anonymous complaint which alleged that Petitioner had run for politi-

cal office while employed by the PSP.

19. The Bureau assigned Lieutenant Brooke F. Young to investigate the complaint.

20. On July 7, 1989, upon completion of the investigation, Captain Robert G. Werts, Commanding Officer of Troop "M", issued a Disciplinary Action Report to Petitioner charging him with a violation of Field Regulation 1-1, Section 1.12.

21. Thereafter, the Department Disciplinary Officer determined that the offense with which Petitioner was charged was a court-martialable offense.

22. From December 13, 1989 until April 29, 1990, Petitioner was placed on "restricted duty"-restricted to on-station duties-but he still retained the full powers of a PSP officer and received full pay.

23. A court-martial hearing was held on April 4, 1990.

24. PSP court-martial proceedings are legislatively governed by 71 P.S. Section 251.

25. At the conclusion of the hearing, the three-member court-martial board, by unanimous vote, found that Petitioner ran for a political office during his employment with the PSP and, as such, was guilty of violating Field Regulation 1-1, Section 1.12. The board, again by unanimous vote, recommended that Petitioner be sanctioned with a ninety-day suspension without pay.

26. Commissioner Sharpe, as the final arbiter of the court-martial proceeding, basically adopted the board's findings of fact, conclusions of law, and recommended sanction.

27. On April 25, 1990, the Commissioner suspended Petitioner from the PSP force without pay, effective April 29, 1990, for a total of ninety working days.

28. Thereafter, on May 11, 1990, the Supreme Court of Pennsylvania in Commonwealth of Pennsylvania v. State Conference of State Police Lodges of the Fraternal Order of Police, Nos. 8 and 9 M.D. Appeal Docket 1989, upheld an arbitration award which allowed PSP officers charged with offenses subject to court-martial proceedings between July 1, 1988 and June 30, 1990 to select grievance arbitration as an alternative to a court-martial.

29. All those members of the PSP who had been court-martialed between July 1, 1988 and June 30, 1990 were then notified of the opportunity to agree to abide by the Commissioner's decision already imposed as a result of the court-martial proceedings or to grieve the penalty imposed by the Commissioner before an arbitrator.

30. Petitioner was among those notified about the election of remedies

and, on July 26, 1990, he selected the grievance arbitration procedure.

31. On September 1, 1990, Petitioner returned to full duty and full pay status with the PSP.

32. Petitioner's grievance arbitration proceeding has yet to be scheduled.

33. When Petitioner's matter goes to arbitration, even if the arbitrator finds that Petitioner violated Field Regulation 1-1, Section 1.12, the arbitrator cannot impose a penalty greater than the penalty already imposed by the Commissioner.

34. Petitioner, however, intends to run for political office again in the future.

35. Petitioner alleges that Field Regulation 1-1, Section 1.12 violates his First Amendment rights of free speech and association.

36. Petitioner alleges that Field Regulation 1-1, Section 1.12 is overbroad

and may not be enforced consistent with the United States Constitution.

37. Petitioner does not challenge that portion of Field Regulation 1-1, Section 1.12 which prohibits members of the PSP from holding political office during employment.

38. Petitioner concedes that PSP officers who hold political office could compromise the PSP's interest in maintaining an appearance of impartiality in its officers' enforcement of the law.

39. As such, Petitioner concedes that the PSP has a legitimate and substantial state interest in prohibiting its members from holding political office during their employment.

40. Petitioner, does, however, challenge that portion of Field Regulation 1-1, Section 1.12 which prohibits members of the PSP from running for political office during their employment.

41. As such, Petitioner contends that the PSP has no legitimate and substantial state interest in prohibiting its members from running for political office during their employment.

42. Petitioner also argues that the PSP has no authority to enforce Field Regulation 1-1, Section 1.12 because the regulation was effectuated without any legislative authority.

43. The Respondents, however, contend that the PSP does have legitimate and substantial state interests in prohibiting its members from running for political office during their employment for the following reasons:

a. Members of the PSP have a duty to impartially enforce and execute the laws of the Commonwealth of Pennsylvania. Members of the PSP cannot effectively carry out their law enforcement responsibilities and at the same time be a candidate for or

hold political office.

The regulation prevents members of the PSP from utilizing their employment as police officers to favor those individuals who might aid them in their campaigns or adversely affect those individuals who oppose their campaigns. Even if the members do not actually favor or adversely affect certain individuals, the public may have that perception.

If a member of the PSP is publicly known to be politically aligned with a particular political party, the public will not perceive that member as an impartial law enforcement officer. That member will be perceived to be that political party's "watchdog". Members of the public who do not belong to that political party will be more suspect of that officer's traffic citations, investigations, arrests, charges, etc. They will perceive the officer's actions as discriminatory against

them. Members of the public who are served by the candidate-member may perceive that the jurisdiction which the candidate-member will serve will receive an additional level of police services from the PSP if the candidate-member is elected.

b. One of the goals of the PSP is to administer and enforce the laws of the Commonwealth of Pennsylvania in a neutral, even handed manner. The PSP cannot carry out this goal if its members are publicly aligned with political parties. If members of the PSP are publicly aligned with political parties, the public will perceive the PSP itself as "backing" those persons and those parties as opposed to being a neutral law enforcement agency. Perhaps the most gross example would be if the Commissioner of the PSP ran for Governor of Pennsylvania on the Democratic ticket. Then the public would perceive the entire PSP membership as backing the Com-

missioner and the Democratic Party.

c. The PSP fears that if its members could run for or hold political office, they would face conflicts of interest between their duties to uphold the laws of the Commonwealth of Pennsylvania and abide by the internal rules and regulations of the PSP and their allegiances to their parties.

A PSP member who is also a candidate for or holder of a political office may neglect his/her duties as a PSP officer in the interest of the political office. For example, the speed limit on state highways is 55 m.p.h. A PSP member is sworn to enforce that speed limit. As a candidate for or holder of a political office, that same PSP member may support a change in legislation to increase the speed limit to 70 m.p.h. The member's candidacy or office is then at odds with his/her PSP oath to uphold the laws of Pennsylvania.

Likewise, a PSP member who is a candidate or officeholder may advocate a political position directly contrary to PSP regulations. For example, Field Regulation 2-1, Section 1.03 prohibits members of the PSP from becoming involved in matters regarding the formation or funding of local police departments. In this case, Petitioner was running for the position of township supervisor in a township which does not currently have an organized police department and, as such, relies solely on the PSP for police protection. In an article which appeared in The Morning Call on May 4, 1989 at page 6, Petitioner stated "The township is changing rapidly, and managing the growth--trying to anticipate the needs of the township--I think that takes a lot of consideration."

Petitioner further stated "I wouldn't want people to think that because I'm a police officer I'm going to say, 'Now we

should get a police department.' When the residents are ready, I can aid them." Thus if Petitioner had been elected to the township board of supervisors, there was a real likelihood that he would have become involved in a decision whether or not to create a local police department.

d. The regulation promotes integrity in discharging police duties by avoiding situations where members of the PSP could utilize their positions to attempt to influence or to actually influence members of the public to support them in their political campaigns. The PSP fears that, if it allows its members to run for or hold political office, those members will use their positions to coerce members of the public to register in particular political parties, sign their nominating petitions and/or vote for them in elections. Even if there is no actual coercion, influence or intimidation, the

PSP fears that will be the public's perception.

e. The PSP seeks to attract qualified persons through guaranteeing job security free from the political arena. If the PSP allowed its members to run for or hold political office, its ranks could become filled with political officeholders. How one rose within the ranks of the PSP could then become dependent upon their party affiliation. For example, troopers serve an eighteen-month probationary period following their enlistment. At the end of the eighteen-month period, the probationary trooper's co-troopers, supervising corporals, sergeants, station lieutenant and troop commander make recommendations as to whether the PSP should retain the probationary trooper as a permanent member. If the PSP became too ladened with political officeholders, its members might begin to consider political affiliations in

deciding matters of retention.

f. Members of the PSP have access to confidential Criminal History Record Information. A member of the PSP who runs for political office could use such confidential information, to the extent that it exists, against an opponent or a member of the opponent's family during an election.

g. The PSP wants to avoid any perception by members of the public that how they act politically will affect their relationship with the PSP. For example, the PSP does not want members of the public to believe that, if they do not vote for a member-candidate they will be subject to greater law enforcement scrutiny by the PSP. Likewise, the PSP wants to avoid the perception that members of the public who do sign a petition or vote for a member-candidate will receive more favorable treatment from members of the PSP.

III. DISCUSSION

Plaintiff argues initially that the

Pennsylvania State Police restrictions on running for public office as stated in Field Regulation 1-1, Section 1.12 violate his First Amendment rights of free speech and association. At the outset I note that the Supreme Court observed in United States Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 548, 657, 93 S.Ct. 2880, 2891, 37 L.Ed.2d 796 (1973) that "[n]either the right to associate nor the right to participate in political activities is absolute in any event." There, the Court upheld as constitutional Section 9(a) of the Hatch Act, 5 U.S.C. Section 7324(a)(2), which inter alia, barred specified federal employees from holding a party office or working at voting polls. Accordingly, the Court characterized this provision as unquestionably valid and stated that it would uphold as constitutional a statute that "in plain and understandable language...forbade activi-

ties such as...becoming a partisan candidate for, or campaigning for, an elective public office..." Id. at 556.

The Court's approach in Letter Carriers was underscored in Broadrick v. Oklahoma, 413 U.S. 601, 93 S.Ct. 29078, 37 L.Ed.2d 830 (1970), holding that a state can restrict the partisan political activities, including becoming a candidate for nomination or election to any paid public office, of its classified civil servants without running afoul of the employee's First Amendment rights.

There is little doubt that the state can impose constitutionally permissible limitations on the partisan political activities of its employees. However, as reflected in the Court's reasoning in Letter Carriers, supra, to pass constitutional muster a balance between the rights of the employee and the interest of the state must be struck:

> [T]he government has an interest in regulating the conduct and 'the speech of its employees that differ[s] significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the [government], as an employer, in promoting the efficiency of the public services it performs through its employees.' United States Civil Service Commission v. National Association of Letter Carriers, supra., 413 U.S. at 564, 93 S.Ct. at 2890 (quoting Pickering v. Board of Education, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734, 20 L.Ed.2d 811 (1968)."

This test was applied in Giglio v. Supreme Court of Pennsylvania, 675 F.Supp . 266 (M.D. Pa, 1987), where plaintiff unsuccessfully challenged the constitutionality of memoranda of the Pennsylvania Supreme Court forbidding him to run for the office of district justice while employed as a state probation officer ("The proper test to apply...involves the balancing between

[plaintiff's] first amendment rights and the interests of the state...which are at stake.) Id. at 270. Similarly, in Adams v. Supreme Court of Pennsylvania, 502 F.Supp. 1282 (M.D. Pa, 1980), a District Justice unsuccessfully challenged the constitutionality of a Pennsylvania law requiring him to resign his office when he became a candidate for Congress. ("[T]he proper test involves a balance between the individual's First Amendment rights and the interests the government has at stake".) Id. at 1292.

As marshaled in the stipulated findings of fact, several state interests are at stake in enforcing the Field Regulation 1-1, Section 1.12 ban on an employee running for political office while employed as a State Trooper. For example, the state argues that the regulation at issue prevents troopers from using their broad discretionary powers as law enforcement

officers to garner favors from potential constituents and other interested persons or from meting out punishment to political opponents and their supporters. (FF 43a). In a similar vein, the goal of the State Police to enforce laws in a neutral and evenhanded manner would be compromised if the individual troopers were to become aligned with political parties and their leaders. (FF para. 43b).

Law enforcement officers occupy a position of trust, which concomitantly carries privileges. State Police troopers have access to confidential Criminal History Record Information (FF para. 43f) and participate in and are privy to criminal investigations. If a trooper were to be allied with a particular political leader, he may be persuaded to supply confidential information about the criminal history of an opponent and his or her family and friends. Also, if no prohibition existed

as stated in Field Regulation 1-1, Section 1.12, criminal investigation and prosecution of political corruption may be compromised.

Regardless of whether these activities would actually occur, permitting troopers to run for political office would to some extent undermine public confidence in the state police and cultivate a public perception of politically motivated law enforcement. (FF para. 43g). This would severely undercut the effectiveness of the state police and in no small measure lessen the ability of the state police to attack qualified candidates. (FF para. 43e).

Plaintiff concedes that troopers should not be permitted to hold political office because this could compromise the state police's interest in maintaining an appearance of impartiality in its officers' enforcement of the law! (FF para. 38) and that the PSP has a legitimate and

substantial interest in prohibiting its members from holding political office during employment. (FF para. 39). However, plaintiff fails to explain why the state's interests in support of a ban on troopers from holding office do not apply with equal force in determining whether the state may bar troopers from running for political office. Moreover, I find no palpable distinction that would lessen the application of these state interests in preventing either course of conduct. Assuming arguendo that a trooper was permitted to hold political office, his or her conduct would be scrutinized by the press and public. In contrast, if a trooper was permitted to run for political office and lost the election, he or she could quietly engage in some of the pernicious activities outlined above (FF para. 43) in hope of garnering support and eventually winning an election.

Field Regulations 1-1, Section 1.12 limits a trooper's First Amendment right to run for political office. However, this limitation is outweighed by the state's legitimate and substantial interest in preventing potential abuse by troopers in carrying out their duty to enforce the law in an even-handed and neutral manner and safeguards the appearance of propriety. See Nicodem v. Com, Pennsylvania State Police, 64 Pa. Commonwealth Ct. 323, 439 A.2d 1325 (1982) ("A state police member wields much discretion and authority; even the valid action of a candidate-police officer during a campaign could be misconstrued and thus harmful to law enforcement. Hence the state police restriction on running for political office [Field Regulation 1-1, Section 1.12] is not constitutionally inform;" Id at 1328). Therefore, Field Regulation 1-1, Section 1.12 does not unconstitutionally infringe on plaintiff's

First Amendment rights.

Plaintiff challenges the scope of Field Regulation 1-1, Section 1.1.2 as overbroad and therefore facially unconstitutional. In Broadrick v. Oklahoma, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830(1973), the Court stated, "where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." Id. at 615. In consonance with this principle, the Third Circuit for the Court of Appeals in Aiello v. City of Wilmington, Delaware, 623 F.2d 845 (1980), restated its approach to the "substantial overbreadth test" as follows:

> "When faced with an overbreadth challenge a court must decide, first if there is a legitimate and substantial state interest in regulating a class of speech, and, if so, whether that interest is being 'pursued by means that broadly stifle fundamental and personal liberties when the end can be more narrowly achieved.'" (citations omitted) Id.

at 855

In discussing the First Amendment rights of public employees, the Court noted that "[t]he area of unregulable speech available to public employees is...narrower than that available to the public at large." Id.

As already established, I find that Field Regulation 1-1, Section 1.12 serves a legitimate and substantial interest of the state. After balancing this state interest against the interest of the individual's First Amendment rights, this regulation does not unconstitutionally infringe on plaintiff's First Amendment rights. Turning next to the breadth of the regulation, I find that the regulation's proscription against running for political office is tailored as narrowly as is possible to achieve its intended result. ("No Member of the Department shall...run for...political office during his/her employment." Field Reg. 1-1, Section

1.12). A less restrictive alternative would have a deleterious effect upon the state's legitimate concerns for even-handed law enforcement and the appearance of propriety.

Indeed, this regulation explicitly preserves the right of employees to participate substantially in political activities. ("Nothing contained herein shall affect the right of a Member to hold membership in, and privately support, a political party; or to vote as he/she chooses; or to privately express his/her opinion on any political subject or candidate; or to maintain political neutrality; or to attend political meetings as a private citizen." Field Reg. 1-1, Section 1.12). In this regard, plaintiff fails to present a single example of a potentially invalid application of this regulation. See Aiello v. City of Wilmington, Delaware, 623 F.2d 845 (3d Cir, 1980).

Hence, I find this regulation is not substantially overbroad.

Finally, plaintiff argues that defendant's regulation must fall because it was not legislatively enacted. I disagree. Regulations of this nature have been routinely upheld as valid exercise of authority. See Aiello v. City of Wilmington, Delaware, 623 F.2d 845 (3d Cir, 1980) (Rules and Regulations of the Bureau of Fire of City of Wilmington, Delaware); Giglio v. Supreme Court of Pennsylvania, 675 F.Supp. 266 (M.D. Pa. 1987) (Memoranda of the Pennsylvania Supreme Court)' Nicodem v. Com. Pennsylvania State Police, 64 Pa. Commonwealth Ct. 3232, 439 A.2d 1325 (1982) (Pennsylvania State Police Field Regulation 1-1, Section 1.12).

IV. CONCLUSIONS OF LAW

1. Field Regulation 1-1, Section 1.12 does not violate plaintiff's First Amendment rights to free speech and associ-

ation.

2. Field Regulation 1-1, Section 1.12 is neither overbroad nor in violation of the First Amendment.

3. Field Regulation 1-1, Section 1.12 is not inform because it was not legislatively enacted.

4. Plaintiff's motion for a permanent injunction is denied.

5. Plaintiff's complaint is dismissed.

6. Judgment shall be entered in favor of the defendants.

An appropriate order follows.

IT IS SO ORDERED.

DANIEL H. HUYETT, 3D, JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PORTER E. KRISHER, Plaintiff	:	CIVIL ACTION
	:	NO. 90-5594
vs.	:	
	:	
RONALD SHARPE, ROBERT G. WERTS, BROOK YOUNG and RICHARD MOONEY, Defendants	:	

ORDER

HUYETT, J. FEBRUARY 15, 1991

In accordance with the foregoing findings of fact, discussion, and conclusions of law,

Judgment shall be entered IN FAVOR of defendants Ronald Sharpe, Robert G. Werts, Brook Young and Richard Mooney and AGAINST plaintiff Porter E. Krisher on all claims raised in plaintiff's complaint. The complaint is DISMISSED. IT IS SO ORDERED.

DANIEL H. HUYETT, 3D, JUDGE

Supreme Court, U.S.
FILED
DEC 9 1991
OFFICE OF THE CLERK

(2)

NO. 91-742

IN THE SUPREME COURT OF THE
UNITED STATES
OCTOBER TERM, 1991

PORTER E. KRISHER,
Petitioner

v.

RONALD SHARPE, ROBERT G. WERTS,
BROOK YOUNG and RICHARD MOONEY,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a Pennsylvania State Police regulation that prohibits its members from running for office during their employment is overbroad or violates an officer's First Amendment rights of free speech and association?

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STATEMENT OF THE CASE

Petitioner, Porter E. Krisher, is a Pennsylvania State Police ("PSP") trooper. (Petition, pp. 40-41.)[1] He seeks review of the Court of Appeals' affirmance of the District Court's dismissal of his civil rights action, which challenged the constitutional validity of a PSP regulation that prohibits its members from running for political office during their employment.

1. PSP Field Regulation 1-1, Section 1.12, Politics, an internal PSP regulation, prohibits PSP members from participating in various political

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[1]"Petition" refers to the Petition for a Writ of Certiorari which includes the petition and an appendix.

activities, including running for or holding any political office. (Petition, pp. 41-42.) Krisher ran unsuccessfully for political office while a member of the PSP. (Petition, pp. 42-43.) He was subsequently court-martialed. (Petition, p. 45.)

2. Petitioner filed his action in the United States District Court for the Eastern District of Pennsylvania pursuant to 42 U.S.C. §1983 against four high-ranking members of the PSP. (Petition, pp. 39-40.) Petitioner challenged the regulation as overbroad, violating his rights of free speech and association under the First Amendment, and being an improper legislative action. (Petition, pp. 47-49.)

3. As the parties stipulated and the District Court found, the PSP

prohibits its members from running for or holding political office during their employment for several reasons. First, members of the PSP have a duty to impartially enforce and execute the laws of the Commonwealth of Pennsylvania. (Petition, pp. 49-50.) The regulation at issue prevents PSP officers from using their broad discretionary powers as law enforcement officers to garner favors from potential constituents and other interested parties or from meting out unfair punishment to political opponents and their supporters. (Petition, p. 50.) If members of the PSP are publicly aligned with political parties, the public will perceive the PSP itself as "backing" those persons and those parties as opposed to being a neutral

law enforcement agency. (Petition, pp. 50-51.) Likewise, the PSP also fears that its members would face conflicts of interest between their duties to uphold the laws of the Commonwealth of Pennsylvania and to abide by the internal rules and regulations of the PSP and their allegiances to their parties. (Petition, pp. 52-54.)

Other interests underlying the regulation include promoting integrity in discharging police duties by avoiding situations where members of the PSP could utilize their positions to attempt to or actually influence members of the public to support them in their political campaigns. (Petition, pp. 54-55.) Additionally, the PSP seeks to attract qualified persons by guaranteeing job security. The PSP

wants to avoid its ranks becoming too laden with political officeholders such that political affiliation would be considered in matters of retention and promotion. (Petition, pp. 55-56.) Moreover, members of the PSP have access to confidential Criminal History Record Information. A member of the PSP who runs for political office could use such confidential information, to the extent that it exists, against an opponent or a member of the opponent's family during an election. (Petition, p. 56.) Finally, the PSP wants to avoid any perception that how members of the public act politically will effect their relationship with the PSP. (Petition, p. 56.)

4. On cross-motions for summary judgment, the District Court rejected

each of petitioner's legal challenges. (Petition, pp. 37-70.) Relying heavily on United States Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 548 (1973), and Broadrick v. Oklahoma, 413 U.S. 601 (1973), the District Court found that the regulation does not unconstitutionally infringe on petitioner's First Amendment rights. (Petition, pp. 56-65.) The Court also found that the regulation is not substantially overbroad nor is it infirm because it was not legislatively enacted. (Petition, pp. 65-68.) The Court of Appeals summarily affirmed. (Petition, p. 33.)

SUMMARY OF ARGUMENT

On certiorari, the Court does not sit simply to reconsider legal rulings by lower courts. Even if it did, the lower courts here did not err. The regulation does not infringe on petitioner's First Amendment rights because the PSP's legitimate and substantial interest in maintaining the integrity of its police force outweighs petitioner's rights. The regulation is not overbroad in light of the PSP's interests and because the regulation's proscription against running for office is tailored as narrowly as possible to achieve its intended result. Furthermore, there is no federal requirement that limitations in political activities for public

employment must be statutorily enacted. Finally, there is no conflict between this case and any other Third Circuit Court of Appeals decision nor is there any conflict among the Courts of Appeals on whether limitations in political activities for public employees can be enacted only by a legislature.

REASONS FOR DENYING THE WRIT

THIS CASE DOES NOT PRESENT ANY SPECIAL OR IMPORTANT ISSUE TO JUSTIFY REVIEW BY THE COURT

1. In seeking certiorari, petitioner simply argues that the District Court and Court of Appeals decided his case wrongly. Petitioner argues that the courts "struck the wrong balance" in deciding that the regulation does not unconstitutionally infringe on his First Amendment rights and that the regulation is not overbroad. (Petition, pp. 24 and 30.) He also argues that limitations in political activities for public employment must be statutorily enacted and that the regulation is unenforceable because the terms of his employment are governed solely by a collective bargaining agreement which does not restrict his political activity.

On certiorari, however, the Court reviews cases of significance; it does not sit simply to reconsider legal rulings by lower courts, even arguably erroneous ones.

2. Petitioner contends that the regulation's prohibition against PSP members running for political office violates his First Amendment rights of free speech and association. According to Letter Carriers, 413 U.S. 548, and Broadrick, 413 U.S. 601, however, a state can impose constitutionally permissible limitations on the partisan political activities of its employees provided that a balance is struck between the rights of the employees and the interests of the state which are at stake. The disputed regulation limits a

PSP member's First Amendment right to run for political office. However, this limitation is permissible in light of the state's legitimate and substantial interest in preventing potential abuse by members in carrying out their duty to enforce the law in an even-handed and neutral manner and in safeguarding the appearance of propriety. The PSP's interests outweigh the petitioner's First Amendment rights. Therefore, the regulation does not infringe on petitioner's rights.

Petitioner also claims that the regulation's reach is overbroad. "[W]here conduct and not merely speech is involved," the overbreadth of a statute, according to Broadrick, "must not only be real but substantial as well, judged in relation to the

statute's plainly legitimate sweep." Id. at 615. As previously discussed, the regulation serves a legitimate and substantial interest of the state. The regulation's proscription against running for political office is tailored as narrowly as possible to achieve its intended result. A less restrictive alternative simply cannot exist without effectively undermining the state's legitimate concerns for even-handed law enforcement and the appearance of propriety. The regulation explicitly preserves the right of employees to participate substantially in political activities. Hence, this regulation is not substantially overbroad.

Petitioner contends too that limitations in political activities for public employees can be enacted only by

a legislature -- they cannot be created by regulation. However, the cases which he cites for that proposition, Letter Carriers, 413 U.S. 548, Broadrick, 413 U.S. 601, Alderman v. Philadelphia Housing Authority, 496 F.2d 164 (3d Cir. 1974), and Rosenthal v. Rizzo, 555 F.2d 390 (3d Cir. 1977), do not say that at all. Respondents' counsel knows of no authority that supports that proposition and, as the District Court found, regulations of this nature have routinely been upheld without need of legislative enactment. See Aiello v. City of Wilmington, Delaware, 623 F.2d 845 (3d Cir. 1980)(Rules and Regulations of the Bureau of Fire of the City of Wilmington, Delaware); Gasparinetti v. Kerr, 568 F.2d 311 (3d Cir. 1977)(Newark Police Department Rules and

Regulations); Giglio v. Supreme Court of Pennsylvania, 675 F. Supp. 266 (M.D. Pa. 1987)(memoranda of the Pennsylvania Supreme Court); Nicodem v. Commonwealth of Pennsylvania, Pennsylvania State Police, 64 Pa. Commonwealth Ct. 323, 439 A.2d 1325 (1982)(Pennsylvania State Police Field Regulation 1-1, Section 1.12).

Petitioner also argues that the respondents may not enforce Field Regulation 1-1, Section 1.12 against him because the terms of his employment are governed solely by a collective bargaining agreement, which does not restrict his political activity. This issue, however, was not raised in petitioner's complaint nor in his motion for a preliminary and permanent injunction; nor are there facts of record relative to a collective

bargaining agreement. Thus, this issue is not properly before the Court and respondents will not address the merits of this issue.

3. Petitioner also claims that the Court should exercise its discretionary review because the Court of Appeals for the Third Circuit "has rendered a decision in conflict with the decision of another Federal Court of Appeals on the same matter." (Petition, p. 21.) The only "conflict" petitioner refers to, though, is with another case from the Third Circuit Court of Appeals, Alderman, 496 F.2d 164, which supposedly stands for the proposition that limitations in political activities for public employees can be enacted only by a legislature. There is, however, no conflict between the two Third Circuit

Court of Appeals decisions in Alderman and this case.[2] Nor are respondents aware of any conflict among the Courts of Appeals on this issue.

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[2]In Alderman, the Third Circuit made clear that it was not deciding "whether [Letter Carriers, 413 U.S. 548, and Broadrick, 413 U.S. 601,] can have any application in the context of a more-or-less ad hoc administrative measure" such as an internal memorandum. Alderman, 496 F.2d at 171. Thus, Alderman does not preclude the application of Letter Carriers' and Broadrick's analysis to the internal PSP regulation at issue in this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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